IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 854 OF 2004
ALONGWITH
SECOND APPEAL NO. 879 OF 2004

Ashok Bhagwant Patil ... Appellant
(In both appeals)

V/s

Sukadeo Avadappa Patil & ors. ... Respondents
(In both appeals)

Mr. D.V. Sutar holding for Mr.V.M. Thorat for the appellant.

Mr. S.S. Shah for the Respondent No.2

CORAM: P.V. KAKADE, J.

DATED: 6TH JULY, 2005

P.C.:

1. Both these appeals are preferred by the same appellant against the order passed by the Addl. District Judge, Pandharpur, whereby judgment and decree passed by the Joint Civil Judge, Jr.Divn., in R.C.S. No. 35 of 1977 was set aside and appeal No. 29 of 1999 was allowed and judgment and order passed by the Civil Judge, Jr.Divn., Pandharpur in R.C.S. No. 71 of 1977 was set aside.

2. I have heard the learned counsel for both parties in

both appeals. Perused the record.

3. The plaintiff in R.C.S. No. 35 of 1977 filed the suit for perpetual and mandatory injunction against the defendants on the ground that the land bearing Gat No. 61 was located at village Shegaon and to the East of the said land there was Gat No.46 owned by defendant No.4. To the West of the said land there was a streamlet flowing North-South in direction having depth of about 21 ft. The streamlet existing in the western portion of his land also passes through Gat No.60 owned by defendant Nos. 14 and 15 and Gat No.62 owned by the defendant No.9. To the south of his land, there is Bhima river and to the north of his land there are lands bearing Gat Nos. 53 and 59 and beyond that there is Degaon-Shegaon road. Between Gat No.61 of the plaintiff and Gat Nos. 53 and 59 there is bund in East-West direction. The height of the said bund is upto 5 to 6 ft. and it is existing since long. The usual cartway of the plaintiff to reach Degaon-Shegaon road is on and along the bund of lands bearing Gat Nos. 47, 53 and 48. The said cartway was being used by the plaintiff and his forefathers since time immemorial and the long standing user of the cartway has ripened into customary right and, as such, the plaintiff has every right to use the

said cartway to reach Degaon-Shegaon road from his land bearing Gat No.61 and hence the suit came to be filed against the defendants for perpetual and mandatory injunction, whereas the other suit came to be filed to ascertain customary right of way since time immemorial.

4. The defendant challenged both suits on various aspects denying the allegations made by the plaintiff that there was alternative way available for the plaintiff to reach Degaon-Shegaon road. It was also submitted that there was no either customary right or right of interest to go through the land of Gat Nos. 47, 53 and 48 and on such and other grounds the suits were sought to be dismissed.

5. The Trial Court, on the basis of available evidence and after hearing both parties decreed R.C.S. No.35 of 1977 and mandatory and perpetual injunction and dismissed the suit R.C.S. No. 71 of 1977 regarding right of way. Appeals were preferred to the Court of Addl. District Judge, Pandharpur. The learned Addl. District Judge, Pandharpur, after hearing both parties and relying on the evidence on record set aside the judgment and order passed by the lower Court and allowed Appeal No. 26 of 1999 and order in Suit No. 35 of 1977

was set aside. Similarly, appeal No. 29 of 1999 was allowed and order passed by the lower Court in R.C.S. No. 71 of 1977 was set aside, by which, direction was given granting way to the defendant from along the bund of Gat Nos. 47, 48 and 53. Hence the present appeals.

6. At the outset, it must be noted that the only substantial questions of law sought to be invoked on behalf of the appellant in both appeals are to the effect that, proper issues were not framed by both the Courts below and the evidence on record was not properly appreciated. However, taking into account the findings recorded and the reasonings adopted by the lower appellate Court Judge, it is clear that such argument cannot withstand at all. It is clear from the record that the Court Commissioner was appointed in this case whose evidence was taken into account by the lower appellate Court. It was the case of the appellant that there was customary right of way in his favour since the time immemorial and also there was no alternative way to read Degaon-Shegaon road and, therefore, right of easement was required to be held to be in his favour. However, as recorded by the lower appellate Court Judge, the evidence of DW-3 Innus and photographs (Exhs. 298 to 307) did show the alternative cartway that was used

by the appellant to reach Degaon-shegaon road from his land Gat No.61. Besides, the appellant's own evidence at Exh.58 concedes that the work for allowing pipeline on and along bund of Gat Nos.47, 53 and 48 was initiated by the defendant long back since 1969 and, therefore, if it was so, then the evidence putforth by the appellant-plaintiff that he has right of way to go to Shegaon-Degaon road from his land from the bund of Gat No.47, 48 and 53 and it was used by him and his fore-fathers to reach Shegaon-Degaon road since the time immemorial becomes supsicious, doubtful and improper.

7. In view of these findings, I am of the view that the learned lower appellate Court Judge has recorded the findings in just and proper manner on the basis of available record. It must be noted that, time and again the Apex Court has held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last Court of fact, being the first appellate Court. Moreover, it is seen from the record that if two logical views were possible from the available evidence, then the view taken by the lower appellate Court on the factual aspects need not and cannot be disturbed in second appeal and in the present case, it is manifest that the evidence on record

indeed has shown that there is alternative way available for the appellant plaintiff and, therefore, I am satisfied that the lower appellate Court has rightly discarded the appellant plaintiff's case in both proceedings.

In the result, both appeals have no merit and are dismissed with no order as to costs.

Consequently, Civil Application No.997 of 2004 in Second Appeal No. 854 of 2004 and Civil Application No. 1029 of 2004 in Second Appeal No. 879 of 2004 also stand dismissed with no order as to costs.

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